

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
Hearing Aid Compatible Mobile)
Handsets, *De minimis* Exception) WT Docket No. 07-250
)
_____)

Comments of the Rehabilitation Engineering Research Center
on Telecommunications Access

The Rehabilitation Engineering Research Center on Telecommunications Access (RERC-TA) submits these comments in response to the Federal Communications Commission's (FCC or Commission) request for comment on the *de minimis* exception to its hearing aid compatibility rules.¹ The RERC-TA is a joint project of Gallaudet University's Technology Access Program (TAP) and the Trace Center of the University of Wisconsin, Madison that is funded by the National Institute on Disability and Rehabilitation Research of the U.S. Department of Education.² The primary mission of the RERC-TA is to find ways to make standard systems directly usable by people with all types and degrees of disability, and to work with industry and government to put access strategies into place. TAP conducts research related to communication technologies and services, with the goal of producing knowledge useful to industry, government, and deaf

¹ Hearing Aid-Compatible Mobile Handsets, Petition of American National Standards Institute Accredited Standards Committee C63 (EMC) ANSI ASC C63, Request for Comments, WT Dkt. No. 07-250, FCC 08-68, 73 Fed. Reg. 33325 (June 12, 2008).

² Note that the comments submitted herein do not necessarily reflect the opinions of the U.S. government.

and hard of hearing consumers in the quest for equality in communications. The program also provides education to Gallaudet students through coursework and mentored research projects related to TAP's research mission. The RERC-TA has previously submitted comments in response to numerous FCC proceedings on hearing aid compatibility issues and continues to be actively involved in the industry-consumer negotiations under the auspices of the Incubator Solutions Program #4 - Hearing Aid Compatibility of the Alliance for Telecommunications Industry Solutions (ATIS).

On December 21, 2007, the RERC-TA submitted comments with the FCC that raised concerns about the FCC's *de minimis* HAC exception, which exempts providers and manufacturers that offer two or fewer digital wireless handset models from the HAC rules.³ The points that we made in those comments still hold true, and we will not reiterate all that we said at that time in this filing. We do wish to re-emphasize, however, that changes to the wireless handset marketplace have called into question the extent to which the current *de minimis* exception should continue to apply to large wireless handset manufacturers that clearly have the resources to incorporate compatibility into their phones. These market changes warrant revisions to this exception so that it is in line with Congress's intent for people with hearing loss to have equal access to telephone equipment used by the general public.

A permanent *de minimis* exception makes no sense for resource-rich companies whose marketing models will always produce only one or two wireless handset models. This is the case, for example, with the iPhone, which may – for the foreseeable future – be

³ See 47 C.F.R. § 20.19(e).

the only wireless handset that is produced by Apple. More specifically, while Apple has already moved on to a second generation of its iPhone, for purposes of the HAC rules, it is not clear that the newer version will count as a second phone, or as simply a replacement for the first phone. If each subsequent iPhone produced by Apple continues to count as a mere replacement for the version that preceded it, then this company will never be deemed to have produced enough phones to disqualify it from using the *de minimis* exception. It is not clear then, that Apple or companies that follow this marketing model will ever produce a sufficient number of phones to pull them out of the *de minimis* category. This result could not have been what Congress intended when it required, in the Hearing Aid Compatibility Act of 1988, that telephone companies provide access to telephone service by people with hearing loss.⁴

At the time that the Commission originally adopted the *de minimis* exception, it explained, in its Regulatory Flexibility Analysis, that the exception was needed because “certain manufacturers and service providers may have only a small presence in the market.”⁵ Certainly, it could not be said that the iPhone has a small presence in the United States. Rather, its widespread distribution – and the expected proliferation of other phones that may follow a similar market model – demonstrates that the exception is being utilized beyond its original purpose.

⁴ 47 U.S.C. §610(a).

⁵ In the Matter of Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones, WT Dkt. No. 01-309, FCC 03-168 (August 14, 2003) at Regulatory Flexibility Analysis, ¶12.

The Commission suggests in its Request for Comments that its primary concern with respect to the *de minimis* exception is that its HAC rule not compromise the promotion of innovation and competition. This is, in fact, the first time that the Commission has sought to justify the *de minimis* rule as a means of promoting innovation. The RERC-TA believes that this justification is misplaced. The HAC Act of 1988 already offers a means by which companies may request a waiver of the HAC requirements for “new telephones, or telephones associated with a new technology or service.”⁶ Built into this waiver process is the ability of the FCC to determine whether compliance with the HAC rules “would increase the costs of the telephones, or of the technology or service, to such an extent that such telephones, technology, or service could not be successfully marketed.” This statutory exemption provides ample authority for the FCC to determine when HAC requirements should be waived to facilitate the introduction of innovative technologies. The *de minimis* exception should not be used for this purpose. Indeed, while the FCC is correct in noting that this exception was adopted not only for small businesses, but also for “businesses of any size that sell only a small number of digital wireless handsets in the United States,”⁷ the FCC explained (at the time that the *de minimis* rule was adopted) that the exception was designed to ensure that the HAC rules did not have a “disproportionate impact” on these businesses. Certainly the HAC rules will not have a “disproportionate impact” on companies like Apple. Closing the *de minimis* loophole for businesses that can afford to incorporate hearing aid compatibility will not hurt this legitimate goal of fostering competition.

⁶ 47 U.S.C. § 610(b)(3).

⁷ Cite.

In its Request, the Commission also notes that large manufacturers with two or fewer highly successful handset models may expand their product offerings in a manner that eventually brings them under the HAC rules. The RERC-TA acknowledges that these manufacturers may move to adopt larger product lines, but we note that this proceeding is concerned with large companies that do *not* take that particular course, and instead continue to upgrade the same one or two products, and receive the ongoing protection of the *de minimis* exception.

The purpose of the *de minimis* rule should be what the FCC originally stated it should be: to reduce the disproportionate impact of its rules on manufacturers and service providers that have a “small presence in the market,” and need the exception to fairly and effectively compete in the marketplace. Businesses that have the means to incorporate access into their products should not be permitted to avoid responsibility indefinitely. For this reason, the RERC-TA recommends that the exception be revised to apply only to small businesses that qualify under the Small Business Administration’s size standards for the wireless industry. These entities will have limited resources and therefore appropriately receive the protection that the *de minimis* exception offers. This approach would also require no modifications of the regulatory flexibility analysis supporting the HAC rules.

The RERC-TA urges the Commission to take this action, so that people with hearing loss continue to have equal access to communications equipment and services as future uses of wireless technologies make their way into the consumer marketplace.

Respectfully submitted,

/s/

Judith E. Harkins, Director
Linda Kozma-Spytek, Research Audiologist
Rehabilitation Engineering Research Center
on Telecommunications Access
Technology Access Program
Gallaudet University
800 Florida Avenue, NE
Washington, D.C. 20002-3695
202-651-5257

Of counsel:



Karen Peltz Strauss
KPS Consulting
3508 Albemarle Street, NW
Washington, D.C. 20008-4214
202-363-1263
kpsconsulting@starpower.net

August 28, 2008